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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-110

BERNARD A. SAKRAIDA,

Petitioner,

versus

AG PRO, INC.,

Respondent.

Brief for Petitioner on Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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CERTIFICATE

The undersigned, counsel of record for Bernard A. Sakraida, certifies that only Petitioner, an individual, has an interest in the outcome of this case. These representations are made in order that Justices of this Court may evaluate possible disqualification or recusal.

JAMES F. HULSE

Attorney of Record
for Bernard A. Sakraida

SUBJECT INDEX

Page

History of Appeal 2

Jurisdiction 3

The Law Involved 3

Questions Presented 4

1. Whether the Judgments of the Court of Appeals that uphold the validity of the combination patent "Dairy Estabiish-ment" on the basis of novelty and non-obviousness decide a federal question in conflict with the standards for determining patent validity enun-ciated by this Honorable Court under 35 U.S.C. §§ 101, 102 and 103 4

2. Whether the Court of Appeals erred in setting aside Trial Court findings to the effect that this combination did not show invention, and did not meet the test of nonobviousness when viewed by the standard prescribed for Rule 52 F.R.C.P. 4

3. Whether the Court of Appeals erred in setting aside Trial Court findings that Petitioner was entitled to a new trial because of newly discovered evidence, the evidence introduced being suf-ficient to rebut any presumption of validity of the patent, when viewed against the standard prescribed by Rule 52 F.R.C.P. 4

SUBJECT INDEX (Continued)

Page

Statement of the Case 5

Statement 5

The Patent "Dairy Establishment" 5

Each Element of the Combination Is Individually Old 6

The Prior Art 11

The Prior Art — Person Having Ordinary Skill 15

The Prior Art -- Person With Expertise 20

Newly Discovered Evidence 21

Summary of Argument 23

Argument 26

Close Scrutiny Required 28

Subject Matter Of The Gribble Patent Lacks Novelty And Does Not Serve The Advancement Of Science 30

The Obvious-Nonobvious Test 38

Overclaiming Causes Invalidity 47

Newly Discovered Evidence 48

Conclusions 52

Certificate 54

Appendix F 1a

Appendix G 3a

CASES CITED

Page

Anderson's-Black Rock, Inc. vs. Pavement Salvage Co., 396 U.S. 57, 24 L.Ed.2d 258 (1969) 2,4,28,29,30,37,42,44-45

Bros., Inc. vs. Grace Manufacturing Co., 320 F.2d 594 (5th Cir. 1963) 52

Butex Gas vs. Southern Steel Co., 123 F.2d 954 (5th Cir. 1941) 46

Concrete Appliances Co. vs. Gomery, 269 U.S. 177, 70 L.Ed. 222 (1925) 45

English vs. Mattson, 214 F.2d 406 (5th Cir. 1954) 52

Goodrich, B. F. Co. vs. Rubber Latex Products, Inc., 400 F.2d 401 (1968) 46

Graham vs. John Deere Corp., 383 U.S. 1, 15 L.Ed.2d 545 (1966) 4,27,28,37,39,45,47

Great Atlantic & Pacific Tea Co. vs. Supermarket Equipment Corp., 340 U.S. 147, 95 L.Ed.2d 162 (1950) 4,24,28,36,48

Hughes Tool Co. vs. Ingersoll-Rand Co., 305 F. Supp. 1119 (S.D. Tex. 1969), affirmed 437 F.2d 1106 (5th Cir. 1971), cert. den. 403 U.S. 918 (1971) 35,46

Lincoln Engineering Co. of Illinois vs. Stewart-Warner Corp., 303 U.S. 545, 82 L.Ed. 1008 (1938) 4,27,29,30,35,36,44,48

Merrifield vs. Canal Commissioner, 72 N.E. 405 2d, at 409 (Ill. Sup. 1904) 31

CASES CITED (Continued)

Page

Rogers vs. Alemite Corp., 298 U.S. 415 29,35

Sisko vs. Southern Resin & Fiberglass Corp., 373 F.2d 866 (5th Cir. 1957) 35

Stamicarbon, N. V. vs. Escambia Chemical Corp., 430 F.2d 290 (5th Cir. 1970) 46

Sterner Lighting, Inc. vs. Allied Electrical Supply, Inc., 431 F.2d 539 (5th Cir. 1970) 48

Traylor vs. Pickering, 324 F.2d 655 (5th Cir. 1963) 52

Zero Manufacturing Co. vs. Mississippi Milk Producers Association, 358 F.2d 853 (5th Cir. 1966) 46

AUTHORITIES

Myths of Greece and Rome, by H. A. Guerber, American Book Company, 1893, p. 221 11

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

Art. I, § 8, cl. 8, The Constitution of the United States of America 3

28 U.S.C. § 1254(1) 3

Rule 19.1(b), United States Supreme Court Rule 3

CONSTITUTIONAL PROVISIONS AND STATUTES CITED (Continued)

Page

35 U.S.C. § 101 ..... 3-4, 23,40,52,53

§ 102 3-4,23,40,52,53

§ 103 ..... *passim*

Rule 52 F.R.C.P. 3,4,24,26,51,52,53

Rule 59(b) 50

Rule 60(b), F.R.C.P. 1,51

Rule 60(b)(2), F.R.C.P. 2,3,21,50,51

Foreword

Citations to the single volume Appendix are simply designated "A" followed by the page number. The patent file furnished by Respondent is *not* reprinted in the Appendix. The patent file is found in the record as attachment (f) to Petitioner's Motion for Summary Judgment that was filed on November 5, 1969, as docket entry No. 16. Citations to quotations from the patent file are designated "R" followed by the page number in the original record, and the citations correspond to previous cited quotations that have appeared in Petitioner's Brief before the Fifth Circuit in Cause No. 72-1108. Citations in the Brief to publications and patents considered by the Patent Office are to references which were attached to Petitioner's (Defendant's) Request for the Admission of Genuineness of Documents (docket entry No. 30), and which have been admitted by Respondent as being correct (docket entry No. 32). These references are referred to simply as exhibits. Exhibit 2 is a copy of "Cattle Shelters and Equipment for South Carolina", *Extension Agricultural Engineering Handbook*, No. 2,1958, p. 21 and 26, published by the Clemson University Agricultural College (A. 94). Exhibit 3 is a copy of a thirteen page document published by Babson Brothers Dairy Research Service in 1959, entitled "The Way Cows Will Be Milked On Your Farm Tomorrow" (A. 94). Exhibit 4 is a nine page copy of the K. Luks patent bearing patent office No. 1, 968, 564 dated July 31, 1934 (A. 94). Exhibit 5 consists of the eighteen page copy of the F. J. Kreutzer patent bearing patent office No. 1, 981, 417 dated November 20, 1934 (A. 95). Exhibit 6 consists of a ten page copy of the F. J. Kreutzer patent bearing patent office No. 1, 981, 418 dated November 20, 1934 (A. 95). Exhibit 7 consists of the twenty page copy of the H. McCornack patent bearing patent office No. 2, 081, 947 dated June 1, 1937 (A. 95). Exhibit 8 is a copy of the Bogert patent bearing patent No. 2, 233, 766 dated March 4, 1941 (A. 96). Each of the foregoing cited references to prior art were admitted into evidence during the trial of this cause on September 13, 1971 (A. 94-6).

IN THE
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BERNARD A. SAKRAIDA,
Petitioner,

versus

AG PRO, INC.,
Respondent.

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that this Honorable Court invalidate Respondent's combination United States Letters Patent 3, 223, 070, entitled "Dairy Establishment", and review Judgments of the United States Court of Appeals for the Fifth Circuit dated June 24, 1973[1] and April 24, 1975. The Petition for Rehearing

---

1 The Judgment rendered on June 25, 1973 (481 F.2d 558), was not final, as the Court deferred a final decision as to the *validity* of Respondent's patent pending a determination in the District Court of Petitioner's Motion for New Trial pursuant to Rule 60(b), F.R.C.P. based upon newly discovered evidence (A. 120-30).

filed by Petitioner on May 6, 1975, was denied by the Court of Appeals on June 9, 1975[2].

HISTORY OF APPEAL

The Fifth Circuit initially reversed a Summary Judgment (A. 44-5) granted Petitioner by the District Court on February 19, 1970 (Judge Ernest Guinn presiding) at 437 F.2d 99. Thereafter, on September 13, 1971, a full trial was held in the District Court (Judge Ernest Guinn presiding), who after first admitting into evidence the Summary Judgment record (A. 57, 93-4, 97), allowed both parties to supplement the record with additional testimony, then entered Judgment in favor of Petitioner (A. 55-6), and adjudged the patent invalid as not meeting the test of novelty and non-obviousness and being controlled by this Court's Opinion in *Anderson's Black Rock, Inc. vs. Pavement Salvage Co.*, 396 U.S. 57, 24 L.Ed.2d 258 (1969) (A. 46-55). The Fifth Circuit again reversed the District Court, held the patent valid, and remanded the case for a determination of the issue of infringement at 474 F.2d 167. However, before the mandate was issued, Petitioner filed "Defendant's Motion For A New Trial" pursuant to Rule 60(b)(2) F.R.C.P., with the Fifth Circuit (481 F.2d 668). Petitioner's Motion (A. 120-30) was referred by the Court of Appeals to the District Court for determination. On February 7, 1974, a hearing was held before the District Court (Judge John Wood presiding), who granted Petitioner's Motion For New

2 All of the prior Judgments and Opinions from the United States Court of Appeals for the Fifth Circuit have been printed in the Appendix to Petitioner's Petition for a Writ of Certiorari, Page 1a-30a.

Trial based upon newly discovered evidence (A. 174-6)[3]. For the third time the Fifth Circuit reversed the District Court, denied Petitioner a new trial based upon newly discovered evidence[4], held the patent valid, and remanded the case for a determination of the question of infringement to the District Court. The most recent Opinion of the Fifth Circuit is not yet reported. (Appendix A, Page 1a-6a).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and Rule 19.1(b), U. S. Sup. Ct. Rule. The Opinions of the Court of Appeals for the Fifth Circuit (481 F.2d 668) became final by the Court's decision rendered on April 24, 1975 (Appendix A, Page 1a-6a). Petitioner's Petition for Rehearing was denied on June 9, 1975 (Appendix E, Page 30a). Petitioner's Petition for a Writ of Certiorari was timely filed on July 17, 1975, and was granted by this Honorable Court on October 14, 1975.

THE LAW INVOLVED

The law basically is Art. I, § 8, cl. 8, *The Constitution of the United States of America*, and 35 U.S.C.,

3 Judge Wood's finding that Petitioner exercised due diligence as required under Rule 60(b)(2) F.R.C.P. to discover the new evidence following a "by chance" meeting with Mr. Herbert G. Meyer in January of 1973, as well as his finding that the new evidence showed that the patented flushing system was not new nor novel and did not meet the test of nonobviousness under 35 U.S.C. § 103 is entitled to be upheld pursuant to Rule 52 F.R.C.P.

4 The most recent Opinion from the Fifth Circuit did not discuss the effect of the new evidence to test nonobviousness under 35 U.S.C. § 103 (Appendix A, Page 1a-6a).

§§ 101, 102 and 103 (Appendix F herein). It is more specifically to be found in the decisions of the Supreme Court of the United States in *Lincoln Engineering Co. vs. Stewart-Warner Corp.*, 303 U.S. 545, 82 L.Ed. 1008 (1938); *Great Atlantic & Pacific Tea Co. vs. Supermarket Equipment Corp.*, 340 U.S. 147, 95 L.Ed. 162 (1950); *Graham vs. John Deere Co.*, 383 U.S. 1, 15 L.Ed.2d 545 (1966); and *Anderson's-Black Rock, Inc. vs. Pavement Salvage Co.*, 396 U.S. 57, 24 L.Ed.2d 258 (1969).

QUESTIONS PRESENTED

1. Whether the Judgments of the Court of Appeals that uphold the validity of the combination patent "Dairy Establishment" on the basis of novelty and nonobviousness decide a federal question in conflict with the standards for determining patent validity enunciated by this Honorable Court under 35 U.S.C. §§ 101, 102 and 103.

2. Whether the Court of Appeals erred in setting aside Trial Court findings to the effect that this combination did not show invention, and did not meet the test of nonobviousness when viewed by the standard prescribed for Rule 52 F.R.C.P.

3. Whether the Court of Appeals erred in setting aside Trial Court findings that Petitioner was entitled to a new trial because of newly discovered evidence, the evidence introduced being sufficient to rebut any presumption of validity of the patent, when viewed against the standard prescribed by Rule 52 F.R.C.P.

STATEMENT OF THE CASE

Respondent, as the present owner of United States Letters Patent 3, 223, 070, entitled "Dairy Establishment" patented on December 14, 1965, filed a patent infringement suit in the Federal District Court at El Paso on October 8, 1968 (A. 7-8, 27-33). Respondent has admitted that *every* "element" of the combination is *old*, i.e., was in use in the dairy business long before the application for patent "Dairy Establishment" was filed on November 5, 1963. Respondent asserts, and the patent was issued, on the finding that the patent was valid as a "combination" patent. The critical element to patent validity centers on the *means* of collecting and releasing the flush water that is used to remove manure of domesticated food producing animals from the floor of a barn (A. 14, 24-5). Claims 1 and 3 of Respondent's patent refer to a means located at the upper end of a sloped concrete floor of a barn to collect or store water as a pond, wherein the water can be released suddenly which allows the collected water to be released as a large volume, which can then travel down the contour of the sloped floor removing the manure as it flows downhill (A. 32-3).

STATEMENT

The Patent "Dairy Establishment"

Respondent's patent, although designated "Dairy Establishment", is allegedly novel and nonobvious because of the "flushing system" employed which allows the physical principle of gravity to operate on flowing water to create a surging effect when a large

volume of water is suddenly released on a sloped floor to remove manure from the floor of a modern dairy barn (A. 13-4, 24-5, 78-82, 108-9, 113-5).

Claim 3, which is dependent upon Claim 1 of the patent, (A. 32-3), is a "combination" of thirteen well-known elements in the dairy industry, and each was individually known in the prior art of dairy construction (A. 75). As noted specifically in the last sentence of Claim 1, and Claim 3, the *means* of creating the "flushing operation" is to collect water as a pool at the upper end of a dairy barn floor, with means so that it can be quickly released as a large volume to flow downhill over the paved floor removing cow manure in its path. The water and manure then flow through the paved gutters to a drain located at the lower end of the floor, and ultimately the wash water can be utilized as liquid fertilizer (A. 32-3). Respondent contends that there is a need to claim the thirteen well-known elements long used in a dairy barn as part of his novel "flushing system" in order to properly "frame the manure flush system" (A. 22, 25, 75).

Each Element Of The Combination Is Individually Old

By its Findings of Fact 1, the Trial Court found that "Dairy Establishment" as described in United States Letters Patent 3, 223, 070 is composed of thirteen elements, (A. 46-7) to-wit:

> (a) ". . . a smooth, evenly contoured, paved surface forming a floor providing a walking surface . . ."

> (b) ". . . drain means for draining wash water from such floor opening to the top of the floor."
>
> (c) ". . . said smooth, evenly contoured surface which forms such floor sloping toward said drain . . ."
>
> (d) ". . . multiple rest areas with individual stalls for each cow and with each of said stalls having a bottom which is also a smooth pavement . . ."
>
> (e) ". . . which is disposed at an elevation above the paved surface forming the floor . . ."
>
> (f) ". . . said stalls being dimensioned so that a cow can comfortably stand or lie in the stall, but offal from the cow falls outside the stall bottom and onto the floor providing the walking surface in the barn . . ."
>
> (g) ". . . said barn further including defined feeding areas having feeding troughs . . ."
>
> (h) ". . . a cow-holding area."
>
> (i) ". . . a milking area."
>
> (j) ". . . a transfer area all bottomed with the walking surface forming said floor in the barn . . ."

(k) "... and floor washing means for washing the floor providing the walking surface in the barn where said floor bottom, said feeding, holding, milking and transfer areas operable to send wash water flowing over the floor with such water washing any cow offal thereon into the said drain means, said floor washing means including means located over a region of said floor which is uphill from said drain means constructed to collect water as a pool above said floor and operable after such collection of water as a pool to disperse the water as a sheet of water over said floor."

(l) A tank on a mounting, so that it can be tilted, and the water poured out to cascade on the floor to form a sheet.

(m) A Floor-washing means comprising a dam for damming or collecting water as a pool directly on the floor, which such dam abruptly openable to send water cascading as a sheet over the floor towards the drain.

In its Findings of Fact 2, the Court concluded that the oral deposition of Donald Joseph Gribble, the president of the Respondent corporation, supported the finding that each of said items was not new but had been used in the dairy business prior to the time of filing the application for patent (A. 47-51). Furthermore, Mr. Gribble reaffirmed his deposition testimony during the trial of said cause and acknowledged that each of the elements of his "flush system" was old in the dairy business long before 1963 (A. 75). The Court also

referred to Respondent (Plaintiff's) Supplemental Memorandum In Opposition To Defendant's Motion For Summary Judgment which was filed of record on the 19th day of January, 1970, in its Findings of Fact 3 (A. 51), wherein it was stated:

> "Plaintiff doesn't deny that the patent is made up of a combination of old elements, just like most other patents."

And:

> "Plaintiff admits that all of the elements are *individually old*, but no one prior to the inventors ever combined the elements as called for in the claims." (Emphasis Added).

Respondent's counsel has acknowledged on more than one occasion that the individual items included within the combination are old. On Page 22 of Respondent's Opening Brief to the Court of Appeals, Fifth Circuit, in Cause No. 72-1108 counsel stated as follows, to-wit:

> "... Plaintiff has never denied that the prior art shows the existence of dairy barns having smooth paved surfaces; floor drains; cow stalls having paved bottom surfaces elevated above the barn floor; stalls dimensioned so that a cow in the stall will discharge offal in gutters through which the water can run; feeding, holding, milking and cow transfer areas all having paved floors; high pressure hoses and sprinkler systems for discharging water

on the barn floor. However, none of the prior art documents shows a floor washing means like that called for in the Gribble and Bennett patent, i.e., a washing means constructed to collect a pool of water above a portion of the floor so that when the water is released it will flow as a sheet to wash relatively instantaneously all barn floor areas and discharge cow offal into drains."

On Page 30 of the same Brief, Mr. Kolisch stated, to-wit:

". . . While water collected in large tanks or pools existed previously, no one prior to Gribble and Bennett ever suggested that it could be used as a floor-washing means *in combination with the other necessary elements of barn construction*." (Emphasis Added).

On Page 33 of the same Brief, counsel admitted the following by stating, to-wit:

". . . plaintiff has never denied that the Gribble and Bennett patent is for a combination of elements which are individually old."

Finally, in Respondent's Reply Brief to the Court of Appeals, Fifth Circuit, in Cause No. 72-1108, on Page 6, Mr. Kolisch attempted to crystalize the *inventive idea* in Respondent's patent in the following language, to-wit:

"At several places in appellee's brief (pages 3, 19, 21, 25) it is argued that since all Gribble and Bennett did was to use the force of gravity on water, which naturally flows downhill, this could not amount to patentable invention. In the first place, the Gribble and Bennett patent does not attempt to patent the idea of gravity making water flow downhill. *What Gribble and Bennett did was to claim as their invention a particular building construction in which, among other things, a pool of water is collected so that when abruptly released the force of gravity acting on the water produces a fast moving sheet of water that performs the washing action (Emphasis Added).*

The Prior Art

Respondent's counsel acknowledged in his *opening comments* to Judge Ernest Guinn on September 13, 1971, that not only has the problem of the accumulation of manure in dairy barns existed for thousands of years, but the idea of using water as a "flushing agent" to remove the deposits of manure has likewise been known since the days of Greek mythology involving the labors of Hercules (A. 57).

It is related in the book *Myths of Greece and Rome* by H. A. Guerber, American Book Company, 1893, page 221, as follows, to-wit:

"Hercules was next sent to Augeas, King of Elis, who had immense droves of cattle. The

stables usually occupied by these animals were in an incredibly filthy state, as they had not been cleaned in years; and now Hercules was given the task to remove the accumulated filth, and make a complete purification of the premises.

Close by these stables rushed a torrent, or rather a river, the Alpheus. *Hercules, with one glance, saw the use he could make of this rushing stream, which he dammed and turned aside from its course,* so that the waters passed directly through the stables, carrying away all impurities, and finally washing them perfectly clean." (Emphasis Added).

When the patent examiner was considering the application of the patent in question, nine prior art patents and two prior art publications were considered (A. 33). The McCornack and Bogert patents (Pet. Exs. 7, 8; A. 95-6), were referred to by Respondent as the "primary references" in his second application addressed to the patent examiner in the hopes of distinguishing the prior art (R. 161-2). Judge Ernest Guinn had available for review all three of the prior decisions from the patent office (A. 51-2) which had twice denied, and then finally approved the patent. Judge Guinn, therefore, was in a position to review each opinion from a patent examiner that passed on the application.[5] Initially, the application was denied by the examiner in part with the following language, to-wit:

5 Appendix G is the advice Respondent received as to how to avoid patented prior art.

". . . Floor washing means 215, 265 are shown washing the different areas. A tank 270 is shown for collecting the waste to be used as a fertilizer. The patent to Bogert discloses the equivalent of a dump tank 37 for washing a barn. Under 35 U.S.C. 103 it is held to be an obvious expedient to employ such a tank in the McCornack device in view of the disclosure in the patent to Bogert." (R. 170-1).

And:

"Relative to Claim 17 it is noted that the patent to Bogert discloses a cap valve 38 that is considered the equivalent of a dam." (R. 171).

The first amendment of the patent was denied by patent examiner Medbery in part in the following language, to-wit:

". . . Since the patent to McCornack discloses that it is old in the art to flush a cattle stall area and collect the waste for fertilizer it is held to be an obvious expedient under 35 U.S.C. 103 to provide the Kruetzer dairy establishment with such a flushing means and waste collection tank." (R. 150).

And:

". . . Floor washing means 265 are shown for the stalls, arrows 281 are disclosed for the drainage of wash water in the cow yards 280 and water pipes 215 are disclosed for flushing

off surface 31 in the milking area. Attention is directed to Page 6, Column 2, Lines 71-75, of the McCornack patent wherein it is stated that drainage is provided for the stables, cow yards, milkrooms and runways as a valuable feature of the dairy plant."

"Relative to Claim 20 it is noted that the disclosed pipes in the McCornack device by necessity are connected with a source of water and merely turning on the water directed through these pipes is considered the equivalent of abruptly allowing the escape of a large volume of water to wash waste from the floors of the dairy plant." (R. 152).

And further continuing:

"... The patent to Bogert *discloses that it is old in the art to provide a large tank 46 positioned at an end of a barn provided with a means 38 for releasing the liquid contained therein at a fast rate. Such an arrangement is held to be the equivalent of a dump tank.* In the Bogert device the liquid from tank 46 is directed to gutters 14, 15 for cleaning the same. Since the patent to McCornack and the S.C. publication disclose a dairy plant combination as stated above it is held to be an obvious expedient under 35 U.S.C. 103 to provide the device of McCornack with tank flushing means for the different surfaces the animals walk on in view of the Bogert patent." (R. 153) (Emphasis Added).

"Relative to Claim 17 it is noted that the Holz patent discloses the equivalent of a dam as at 5 that is selectively raised or lowered and is broadly stated in this claim. The location of the same is held to be a matter of choice or design." (R. 153).

The Court's Findings of Fact 4, 5 and 6 essentially incorporate the prior art and rationale quoted above from two opinions from the patent office (A. 51-2).

The Prior Art — Person Having Ordinary Skill

In addition to the foregoing prior art citations which were before the Patent Office, there is also evidence of the actual use and practice of "water flush" techniques employed by people having ordinary skill in the art to which "Dairy Establishment" pertains. Mr. Robert B. Price, Jr., Mr. Emil Rovey, Mr. Frank Souza, Mr. Chester Whitmore, and Mr. Herbert G. Meyer each testified as to their knowledge and experience of "water flush" in the dairy industry.

Mr. Robert B. Price, Jr. has operated Price's Dairy in El Paso, Texas for twenty two years (A. 84). He also has had occasion to visit quite a few dairies throughout the United States and is generally familiar with the standard dairy barn construction required for Grade A production (A. 85-6). The various elements that comprise "Dairy Establishment" are well-known standard features of a modern dairy barn (A. 86-8). Mr. Price collects water in a 50,000 gallon tank, which is connected to high pressure hoses to remove manure from his floor. He has also seen pictures of operations

where natural flowing water was diverted from a stream through a barn to wash as a sheet of water manure from the floor (A. 89-91).

Mr. Emil Rovey has been a dairy farmer in Glendale, Arizona since 1943 (A. 202). He testified to a dairy and poultry operation he completed in 1948 which employed a water flush system with irrigation water to remove manure from the floor of his dairy barn and below his chicken coops. The wash water was stored in a "cement-lined ditch" and was released onto the dairy barn floor through four ports through the side of the dairy barn that were regulated with four wooden gates (A. 203-4). There were no engineering plans for the dairy, it was simply built from "know-how" (A. 204). Mr. Rovey identified Petitioner's Exhibit A as being a sketch of the floor plan of his dairy barn as of 1950 (A. 205-6, 208, 212-213, 216, 221-2). Mr. Rovey employed a "weir" type mechanism in the side of his barn that allowed dammed irrigation water to pass through "ports" located in the wall of Rovey's barn, and then flow across the sloping concrete floor (A. 206-7). Once the "weir" gate was raised, the dammed water in the irrigation ditch passed through the side of his barn, and onto the concrete floor, and flushed the manure away. Rovey testified that the "surge of water would carry this water and manure to the gutter" (A. 207-8). Located at the lower end of the dairy barn were Rovey's chicken houses. Rovey identified Petitioner's Exhibit B as being a picture of his poultry houses as they existed in 1948 (A. 209-11, 216). Underneath the chicken cages was a cement trough where the droppings would fall, and Rovey had kind of a "plug" located at the top end of the trough which he would pull out to let stored water flow down through the cement

trough and wash the chicken droppings away (A. 208). Mr. Rovey identified Petitioner's Exhibit C as being a newspaper article published on August 2, 1953, in an Arizona newspaper that featured his dairy operation in detail (A. 211-12, 216). Rovey thought he quit using his flushing system sometime around 1955 (A. 220).

Mr. Frank Souza, a dairy barn contractor from Turlock, California, testified to 28 years of experience in dairy construction. As early as 1946, he built a dairy with his brother which utilized a "weir" board system to dam or store water that could be released downhill onto the concrete holding corral floor in order to wash off manure (A. 224-6). Mr. Souza identified Petitioner's Exhibits D, E and F as being a telegram he directed to the attention of Petitioner's counsel, as well as floor plans for early barn construction he designed that employed a "weir" board to dam a large volume of water (A. 223-4, 227-8, 230, 233-4). The nub of Souza's idea was to impound or dam water in the holding corral area so that manure would not stick to the floor. Souza would then raise the "weir" board and the impounded water would leave and flow downhill and would take with it the manure (A. 227-8). Mr. Souza got the idea of "damming water with a weir board" from his older brother (Harry) whom he grew up with on a farm (A. 229). Mr. Souza identified Respondent's Exhibit F as being the floor plan of a barn he designed for a Mr. Frank Mechado in 1949 (A. 230). Mechado's dairy also employed a "weir" board which when activated allowed the wash water to flow downhill and wash away manure from the backside of the holding corral (A. 231-2). Souza testified that it wasn't until approximately nine or ten years ago that he started fil-

ing blueprints of how dairies were built (A. 232). Until that time, Mr. Scuza learned his trade simply by talking with different customers, or craftsman, as well as practicing the trade himself (A. 232).

Mr. Chester Whitmore, who resides in Modesto, California, had thirty three years of experience in the Grade A dairy business from 1929 until 1962. His dairy was located in Modesto, California (A. 235-6). His dairy was featured in an article in *Hoarde's Dairyman* in 1959 (Pet. Exs. H, I; A. 240-43). Mr. Whitmore designed a "flush system" through his observation and "using my own improvision." Mr. Whitmore also visited several dairies in the area and particularly one built by Elvyn Young on Standeford Avenue in Modesto, California. Mr. Whitmore's dairy was completed in the fall of 1953 (A. 236-9). Whitmore defined the term "flush system" as meaning using a lot of water to carry both the fibers and paste of manure from the floor of the barn (A. 236). Whitmore contained the flush water against a shallow wall built around a flat floor with a drain towards the opposite end of the barn. The water was held in place with a "tapered wooden plug" (A. 236-8). When the wooden plug was pulled out of place, the stored wash water flowed through the opening and carried with it the accumulation of manure droppings downhill through the feeding area and into a manure pit at the lower end of the dairy (A. 238). Although Mr. Whitmore presently has no engineering plans for the dairy he built in Modesto, California, he identified Petitioner's Exhibit G as being his sketch or diagram as he remembered his floor plan (A. 238-40).

Mr. Herbert G. Meyer lives in Carmel, California, and is ranch manager for "Herald Ranches" which operates the Mission Dairy[6]. Mr. Meyer acquired the Mission Dairy for a trust in 1961. Not knowing anything about dairies, Mr. Meyer spent a great deal of time investigating the design of other dairies before actually acquiring ownership of the Mission Dairy. Mr. Meyer traveled throughout California and parts of Arizona and examined various types of "flush systems" (A. 245-7). Specifically, Mr. Meyer visited the Koyman Dairy at Lodi, California, and he also visited either DiCarli Dairy or Klaus Dairy in Stockton, California which employed a "drop gate" in its flush operation (A. 248-9, 251). Mr. Meyer also visited Mr. Whitmore's dairy as well as the Max Foister Dairy (A. 248). The Whitmore design was the basis upon which Mr. Meyer predicated his design for a new flush system (A. 249-50). Herbert Meyer decided to put a gate at the upper end of the barn to impound the water, which would give him his volume, and the gate would be operated with a "hydralic ram" which would allow the water to either come out gradually or surge (A. 251). Mr. Meyer had on file with the California Soil Conservation written plans regarding the contemplated construction as of January 1962 (A. 252). Mr. Meyer identified Petitioner's Exhibits J, K, L and M as being various pictures of his drop gate and flush gate system installed at the Mission Dairy (A. 253-5, 258, 264-5). On October 25, 1963, Mr. Meyer began milking operations at the Mission Dairy (A. 253).

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6 Respondent's counsel has conceded that the "flush system" used at the Mission Dairy is substantially the same as what is disclosed by the patent in question (A. 267).

The Prior Art — Person With Expertise

Mr. W. C. Fairbank is an extension agricultural engineer with the Agricultural Extension Service, University of California in Riverside. He is a graduate agricultural engineer from the University of California in 1950, and joined the Agricultural Extension Service in 1958 with primary responsibilities in the area of livestock machanization and related matters (A. 131-2). Mr. Fairbank believed that the Hal Higgins' collection at the Davis Library at the University of California has reference to "water flush" of one kind or another to clean a dairy barn as dating back to the turn of the century or earlier (A. 157-8, 163). Mr. Fairbank discovered written accounts of a "water flush" system that appeared in a 1957 edition of *Hoarde's California Dairyman* (A. 159). Mr. Fairbank was of the belief that articles appearing in dairy magazines were not brought to the attention of the Patent Office (A. 159-62, 171). Mr. Fairbank believed that the "flush out system" that was printed in *Hoarde's Dairyman* in 1957 was very similar to the patent in question (A. 160). Mr. Fairbank described the dairies at Weed and Bishop as being alongside an adjacent stream, and a "weir" board was simply used to divert the stream to flush the barn floor. A system at Lodi, California, used irrigation water (A. 161, 166). Mr. Fairbank agreed that the various and sundry types of flush out systems used the mechanical principle of the gravity flow of water as a means to flush manure by saying, to-wit:

> "The mechanics of it, of that aspect of it in flushing operations, yes, are very similar if not precisely the same. That is why I was disturbed at certain features of the patent and that is why I was one of the persons who said that patent needed to be examined in the light of . . . *because already there was a lot of prior history of that concept.*" (A. 162) (Emphasis Added).

Mr. Fairbank found it difficult to see a difference in substance from collecting water in a stream, ditch, a pond, or a tank. In his words, he thought the differences were "of a vague demarcation between those different hydraulic devices" (A. 162). Collected water has been in long use before 1963. Mr. Fairbank, however, had difficulty as to whether or not there was a difference in principle between "static collection" or "a moving dynamic situation" (A. 163). Mr. Fairbank also had difficulty in understanding the concept of "sheet form of water" as not necessarily having to originate from water released from a drop gate (A. 165-6). Mr. Fairbank testified that the flush operation at the Mission Dairy was in operation about July 23, 1963 (A. 141-2).

Newly Discovered Evidence[7]

During the hearing before the Honorable John Wood on February 7, 1974, Mr. Herbert G. Meyer testified in

7 Petitioner's Motion For New Trial (A. 120-130) was filed initially with the Court of Appeals because Petitioner was the *Appellee* on the date when the "by chance" meeting occurred between Mr. Bernard A. Sakraida and Mr. Herbert G. Meyer in Florida. Upon receiving the Court of Appeals Opinion of June 25, 1973, (Appendix B, Page 6a-9a), Petitioner filed his Motion For New Trial pursuant to Rule 60(b)(2), F.R.C.P. with the Trial Court, and specifically within Paragraph 7 identified Herbert G. Meyer, Frank S. Souza, Emil Rovey, Chester Whitmore, and Dick Ripley as being individuals whom Petitioner intended to call in support of his Motion For Newly Discovered Evidence of prior art of water flush systems that antedated Respondent's patent (A. 123).

corroboration of his Affidavit attached as Exhibit A to Petitioner's Motion For New Trial based upon newly discovered evidence (A. 124-6). Mr. Meyer testified that in January of 1973 he was in Florida on business to view dairy construction and Mr. Sakraida's name had been given to him as being a contractor in the area (A. 255-6). While discussing "flushing systems", Mr. Sakraida indicated he was being *sued* about a flushing system, and Mr. Meyer then told Sakraida that his flushing gate at the Mission Dairy was just like the one involved in the suit (A. 256). Mr. Meyer was then contacted by Mr. Tatem to obtain an Affidavit (A. 256). Mr. Meyer then contacted Mr. Rovey, Mr. Souza, and Mr. Whitmore regarding their knowledge of flush systems (A. 257). Mr. Meyer admitted that he had instructed Mr. Ripley (his manager) not to answer specific inquiries from people who might be inquiring about the "flush system" at the Mission Dairy because of Mr. Meyer's knowledge about a patent suit filed against a dairyman in Los Angeles (A. 261-3).

Although Mr. Sakraida admitted that while he was living in Florida in 1971 he attempted to confirm "rumors" as to the type flush system in use at the Mission Dairy by asking a friend, Mr. Wisdom, who lived in Oregon, to visit the Mission Dairy and report back on the nature of the flush system found, Mr. Wisdom was unsuccessful in discovering any specific details as to what was in use at the Mission Dairy (A. 177-188, 190-195). Mr. A. M. Wisdom confirmed the testimony of Mr. Sakraida and Mr. Meyer (A. 195-7, 200-1).

At the conclusion of the hearing in February 7, 1974, the Trial Court found as follows, to-wit:

"The Court further finds that the defendant did in fact exercise the due diligence required under Rule 60(b)(2) and that the evidence presented to the court at the hearing could not have been discovered in time to move for a new trial under Rule 59(b). In fact, the evidence clearly shows that the names of witnesses and the nature of their testimony was discovered purely *by chance* by the Defendant himself at a meeting in January of 1973 by Herbert G. Meyer. Mr. Meyer and all Defense witnesses presented at the hearing testified that they had never been aware of the litigation of the case at Bar at any time prior to this meeting." (Emphasis Added). (A. 174-5).

SUMMARY OF ARGUMENT

United States Letters Patent 3, 223,070, entitled "Dairy Establishment", being a combination patent of thirteen elements which are each admittedly old and well-known features of standard modern dairy barn construction, is required to be closely scrutinized with a view towards the improbability of finding an inventive idea. Landmark precedents enunciated by this Honorable Court have established the *precise test* to review patent validity in terms statutorily defined in 35 U.S.C. § 101, 102 and 103, to be "novelty" and "nonobviousness." Unless a patent is found to meet these statutorily defined standards, it is not entitled to patent validity. The Trial Court thrice denied validity to "Dairy Establishment" because the combination was

not novel, and did not meet the standard of nonobviousness. These Trial Court findings are supported by the evidence, are not clearly erroneous, and are, therefore, entitled to affirmance under Rule 52, F.R.C.P. The Court of Appeals misapplied the test of what constitutes a synergistic effect. There is no difference in the effect here from what it was in the *Great Atlantic & Pacific Tea Co. case.*

A mere aggregation of old ideas blended together, wherein each element performs the same function it has long performed outside of the combination, does not add to the sum of useful knowledge, is not a novel idea, and does not meet the test of nonobviousness.

The citations to prior art patents within the dairy industry, the numerous admissions of record that each of the elements of the combination was individually old, the testimony of individuals with normal skill in the art, as well as the testimony of experts, rebutted any validity that may otherwise attach to an issued patent. The mechanical application of the physical prinicple of gravity that occurs when water is released so as to run downhill over a sloped, paved floor, so that it will carry with it cow manure into a gutter and then finally into a drain located at the lower end of the sloped floor, does not add to the sum of useful knowledge because it is not inventive, since the combination does not change the respective functions of the individual elements within the combination, but simply combines them in a way that is effective as a "manure flush system." Because of gravity, and not invention, water will always run downhill. Furthermore, because of the general propensity of water, and not invention, water tends to loosen and carry with it matter that is deposited in its path as it runs downhill. Generally, the cleaning action of water is directly related to the slope or grade of the floor and the volume of water that is released.

Furthermore, the application of a means to house water at the upper end of a dairy barn, so that it can be quickly released to allow the water to escape as a large volume as the first step in the flush system of "Dairy Establishment" is a means merely of convenience, contains no new idea, is not novel, and does not meet the test of nonobviousness. The use of a "tank" as a means to accomplish a water flush for a modern dairy barn when used in combination with admittedly other old elements of standard barn construction is merely a matter of the mechanics of construction, is simple, and would be well-known to those schooled in the art of mechanical construction.

Even assuming the application of such a means as is depicted in Claim 3 of "Dairy Establishment" is a novel idea, Respondent has nevertheless overclaimed his alleged invention by combining the means set forth in Claim 3 with all of the old standard features of dairy barn construction that have been long and widely used, and which are not patentable themselves, but which are integral parts of Claim 1 of "Dairy Establishment."

The Trial Court finding that Petitioner exercised due diligence to discover and develop his new evidence

following a "by chance" meeting with Mr. Herbert G. Meyer in Florida in January of 1973, is entitled to be affirmed under Rule 52, F.R.C.P. because said finding is supported by the credible evidence of record, and is not clearly erroneous.

ARGUMENT

The Trial Court's Findings of Fact fully support the judgments entered by the Trial Court for the Petitioner (A. 46-52, 174-5, 258). These Findings were to the effect that the component parts of the Gribble patent are all old, that they are not novel, and that the combination of them in this patent is not novel, and does not meet the test of nonobviousness. The Findings are further to the effect that the idea of a water flush system to clean a barn or stable of manure is not new or novel. These Findings are supported by the evidence, and certainly are not clearly erroneous. They are, therefore, pursuant to Rule 52, F.R.C.P., controlling in this case.

"Dairy Establishment" is a *combination* patent. Its component parts are admittedly all old. Claim 1 of the patent covers the entire floor plan or layout of a modern dairy barn along lines long known and widely used for Grade A milk production. The essence of Respondent's patent is its use of the gravity flow of water to clean a dairy barn floor, when the water is suddenly released onto a sloping concrete floor. There is nothing novel in this, nor does the patent meet the test of nonobviousness as set out in 35 U.S.C. Sec. 103, and covered in this Court's Opinion in *Graham vs. John Deere Co.*, 383 U.S. 1, 15 L.Ed.2d 554 (1966).

The Court of Appeals, Fifth Circuit, stated it is uncertain as to the "precise test" it was required to follow in determining the "nonobviousness" of the combination patent in question under 35 U.S.C. § 103 by stating as follows, to-wit:

> ". . . Although the Court in *Graham* clearly rejected the Fifth Circuit rationale that an invention is patentable when it produces an 'old result in a cheaper and otherwise more advantageous way', what precise test, if any, that Court substituted is unclear." (Appendix C, Page 20a-21a).

The Court of Appeals also stated the combination of old parts in this patent achieved a "synergistic result", (Appendix C, p. 22a), but it misapplied the concept of what is the test of a synergistic result. The evidence in this case shows only that adding together the parts of the combination gave a result equal to the sum of them, and not a result that was greater than this sum. There is, therefore, no synergistic result in this case. Petitioner submits that synergistic result cannot be used, as it was by the Court of Appeals, to bolster its opinion that the Gribble patent meets the tests of novelty and of nonobviousness. The holding of the Court of Appeals in this case is, therefore, contrary to the holdings of this Honorable Court in *Lincoln Engineering Co. vs. Stewart-Warner Corp.*, 303 U.S.

545, 82 L.Ed. 1008 (1938); *Great Atlantic & Pacific Tea Co. vs. Supermarket Equipment Corp.*, 340 U.S. 147, 95 L.Ed. 162 (1950); *Graham vs. John Deere Corp.*, 383 U.S. 1, 15 L.Ed.2d 445 (1966); and *Anderson's-Black Rock, Inc. vs. Pavement Salvage Co.*, 393 U.S. 57, 24 L.Ed.2d 258 (1969).

Close Scrutiny Required

This Honorable Court has enunciated very definitive guidelines for reviewing the validity of a "combination patent." In very clear, precise language, this Court has stated, to-wit:

> "Courts should scrutinize combination patent claims with a care porportioned to the difficulty and improbability of finding invention in an assembly of old elements. The function of a patent is to add to the sum of useful knowledge. Patents cannot be sustained, when on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements with no change in their respective functions, such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men. This patentee has added nothing to the total stock of knowledge, but has merely brought together segments of prior art and claims them in congregation as a monopoly.

The Court of Appeals and the respondent both lean heavily on evidence that this device filled

a long felt want and has enjoyed commercial success. But commercial success without invention will not make patentability . . . The courts below concurred in finding that every element here claimed (except extension of the counter) was known to prior art. When, for the first time, those elements were put to work for the supermarket type of stores, although each performed the same mechanical function for them that it had been known to perform, they produced results more striking, perhaps, than in previous utilization. To bring these devices together and apply them to save the time of customer and checker was a good idea, but scores of progressive ideas in business are not patentable, and we conclude on the findings below that this one was not." *Great Atlantic & Pacific Tea Co. vs. Supermarket Equipment Corp.*, 340 U.S. 147 at 152-3 (1950).

The need for a close scrutiny of a combination patent is seen in *Lincoln Engineering Co. vs. Stewart-Warner Corp.*, 303 U.S. 545 (1938), where this Honorable Court held the improvement of one part of an old combination gives no right to claim that improvement in combination with other old parts which perform no new function in the combination, citing *Rogers vs. Alemite Corp.*, 298 U.S. 415. This Court said at Page 547, with reference to the Roger's case, to-wit:

> ". . . We held that as the combination of pump, connecting conduit, coupler, and fitting was old, Gullborg could not, by inventing a new and improved type of coupler or fitting claim

either of these in combination with the old forms of the other elements so as to exclude the public from the use and sale of the old forms of fittings or grease guns even though these might be used respectively with Guilborg's improved coupler or his improved pin fittings, because, in the combination claimed, an old type pin fitting, or an old type coupler had no novel function over those of the prior art."

This holding is also implicit in *Anderson's-Black Rock vs. Pavement Salvage Co.*, 396 U.S. 57, 24 L.Ed. 2d 258 (1969).

The Gribble patent therefore needs close scrutiny to see whether it contains innovation, advancement, and things which add to the sum of useful knowledge, which promote the "Progress of . . . useful Arts", *Anderson's-Black Rock, supra*, or is merely an "aggregation" of old ideas blended together wherein each element performed the same function it long has done outside of the combination, *Lincoln Engineering Co., supra*.

Subject Matter Of The Gribble Patent Lacks Novelty And Does Not Serve The Advancement Of Science

The use of a flow of water to clean a barn or stable floor has long been known. The earliest known reference to it is Hercules' fifth labor of cleaning the Augean stables, wherein it is related he *dammed* the river, and by this means turned the flow of water into the stables. This is similar to the use of a weir or gate to hold, impound or dam water in a creek, canal or

flume, which is likewise old in the art. A "weir" board or gate has long been used to divert water for various purposes, such as to run a water wheel, irrigate land or to wash a dairy barn floor. The case of *Merrifield vs. Canal Commissions*, 72 N.E. 405, at 409 (Ill. Sup. 1904) describes such a weir, which had been built as early as 1838.

Weir boards were used to collect water, and to divert it onto dairy barn floors at Weed, Lodi and Bishop, California (A. 161-2, 166). This long antedated the filing of the application for the Gribble patent on November 5, 1963 (A. 27-9). In essence, what was done at Weed, Lodi, and Bishop was to dam a small stream or canal alongside the dairy barn, so that water is collected behind the weir or dam, and then by raising a weir board next to the upper end of the barn, the dammed water ran out of the stream or canal in which it was collected, and across the upper end of the barn floor, from whence it flowed on down the floor to the lower end of the barn (A. 161-2). The principles involved in doing this are essentially the same as those involved in the Gribble patent. The said patent provided for a floor washing means "operable to send wash water flowing over the floor with such water washing any cow offal thereon into said drain means, said floor washing means including means located over a region of said floor which is uphill from said drain means constructed to collect water as a pool above said floor and operable after such collection of water as a pool to disperse the water as a sheet of water over said floor" (Claim 1. A. 32).

It further recites, "3. The barn of Claim 1, wherein said floor-washing means comprises a dam for damming and collecting water as a pool directly on the floor, and such dam is abruptly openable to send such water as a sheet over the floor toward said drain means" (Claim 3, A. 33).

In its Reply Brief in the Court of Appeals, Cause No. 72-1108, Respondent described its patent as follows:

> ". . . What Gribble and Bennett did was to claim as their invention a particular building construction in which, among other things, a pool of water is collected so that when abruptly released the force of gravity acting on the water produces a fast moving sheet of water that performs the washing action . . ." (Page 6).

The floor washing operation described in said claims is in essence the same as in the examples of the prior art heretofore set out. All of them collect water in a pool, all of them have the pool of water adjacent to the dairy barn floor, and all of them have a means of releasing it suddenly, so as to send a sheet of water by gravity across the barn floor to wash away the manure.

All of these employed the common sense arrangement of storing the water so that it flows onto the upper end of the barn floor, which permits it to be carried down the floor by gravity.

The evidence not only shows the use of water collected in a pool, and then released onto the dairy barn

floor at Weed, Lodi and Bishop, but also shows that a "water flush" system had been described in a 1957 edition of *Hoarde's California Dairyman* (Pet. Ex. I, A. 159, 240-2), which was a trade publication widely disseminated on the West Coast among those in the dairy business (A. 159). Mr. Fairbank thought the water flush system described in *Hoarde's Dairyman* was very similar to the one described in the Gribble patent (A. 160). The evidence further shows that the Hal Higgins' collection at the library of the University of California at Davis, California, contains material about water flush systems to clean dairy barns as far back as the beginning of the 20th Century (A. 157-8, 163, 257).

The testimony of Robert Price established that the basic layout of the dairy barn floor described in the Gribble patent is shown to be standard dairy barn construction in use for many years prior to the Gribble patent application. Mr. Price also testified to having seen pictures showing a diversion of water to clean a dairy barn floor (A. 85-91).

The prior use of water collected in a cement lined ditch, or in a tank on the barn floor, and released to carry away manure was covered in detail in the testimony of Emil Rovey, of Glendale, Arizona, Frank Souza, of Turlock, California, Chester Whitmore, of Modesto, California, and Herbert Meyer, of Carmel, California. Mr. Rovey testified to using a water flush system back as early as 1948, releasing the water from a ditch in which it was stored onto the barn floor through four ports which were regulated by four wooden gates (Pet. Ex. C; A. 202-22). Pet. Ex. B (A. 209-

11) shows Rovey's idea of water flush being applied to chicken coops. Mr. Souza was a dairy barn contractor, and as early as 1946 he was building dairy barns which had a water flush system. He used a weir board system to release water onto a concrete dairy barn floor to wash off the manure (A. 224-232). What he did was to use a weir board to impound the water on the barn floor where it was then released to flow downhill (A. 223-8).

Mr. Whitmore, whose dairy was featured in the *Hoarde's Dairyman* in 1959, built a water flush system, storing the water on the barn floor, and which, when released, carried the manure with it (A. 236-8).

Mr. Meyer visited many dairies in 1961 before building the Mission Dairy, and obtained fundamental ideas from, among others, a dairy at Lodi, a dairy in Stockton, and Mr. Whitmore's dairy. Mr. Meyer used the Whitmore Dairy system as the basis for the one he built, (A. 245-265), plans for which were on file in January, 1962, with the California Soil Conservation office (A. 252), and his design is said to be quite similar to the one described in the Gribble patent (A. 267).

The Trial Court was certainly free to consider both the references considered by the patent examiner and his opinions as a basis for his finding of fact that the patent was invalid.[8] The record shows the patent examiner stated certain prior patents anticipated the one applied for by Gribble in certain respects, as set out at 13-15 of this Brief. Particularly in point is the lan-

8 Judge Guinn had the recommendation from the Patent Office to consider as to how to avoid prior art (Appendix G).

guage of the District Court in *Hughes Tool Co. vs. Ingersoll-Rand Co.*, 305 F. Supp. 1119 (S. D. Tex. 1969), affirmed 437 F.2d 1106 (5th Cir. 1971), cert. den. 403 U.S. 918 (1971):

> "I recognize that one of the references cited by the Examiner of the Patent Office was Brown 2,725,216, and I recognize the strong presumption in favor of validity resulting from this circumstance. I am convinced, however, that Brown completely anticipates the patent in question, save in the rather insignificant particulars mentioned and discussed above." (At Page 1122). See also *Sisko vs. Southern Resin & Fiberglass Corp.*, 373 F.2d 866 (5th Cir. 1967).

The Trial Court (J. Guinn) found as a fact the water flush system in the Gribble patent was not new, but had long been in the dairy business prior to the filing of the application for the Gribble patent, giving his basis for doing so (A. 48-52), and the Trial Court again (J. Wood) on February 7, 1974, found the "flushing system" in question was not new nor novel, and does not meet the nonobviousness test under 35 U.S.C. § 103 (A. 175, 268). Nor does the Gribble patent contain anything of value in the advancement of science.

It has long been held that to be patentable the subject matter of the patent must be new or novel, and also that it must add to the sum of human knowledge, and must advance science. In *Lincoln Engineering Co. vs. Stewart-Warner Corp.*, 303 U.S. 535, 82 L.Ed. 1008 it was said, referring to the *Rogers case*, 298 U.S. 415:

> "We held that as the combination of pump, connecting conduit, coupler, and fitting was old, Gullborg could not, by inventing a new and improved type of coupler or fitting claim either of these in combination with the old form of the other elements so as to exclude the public from the use and sale of the old forms of fittings or grease guns even though these might be used respectively with Gullborg's improved coupler of his improved pin fittings, because, in the combinations claimed, an old-type pin fitting, or an old-type coupler had no novel function over those of the prior art."

It was further said in the *Lincoln Engineering case:*

> "The mere aggregation of a number of old parts or elements which, in the aggregation, perform or produce no new or different function or operation than that theretofore performed or produced by them, is not patentable invention. (Citing authorities) And the improvement of one part of an old combination gives no right to claim that improvement in combination with other old parts which perform no new function in the combination." (Citing authorities).

The holding in *Great Atlantic & Pacific Tea Co. vs. Supermarket Equipment Corp.*, 340 U.S. 147, 95 L.Ed. 162 is to the same effect. As is indicated by the following statement in the Opinion in said case:

> "Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements. The function of a patent is to add to the sum of useful knowledge. Patents cannot be sustained, when on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements with no change in their respective functions, such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men. This patentee has added nothing to the total stock of knowledge, but has merely brought together segments of prior art and claims them in congregation as a monopoly."

We find a similar holding also in *Anderson's-Black Rock, Inc. vs. Pavement Salvage Co.*, 396 U.S. 57, 24 L.Ed.2d 258 wherein it is said, quoting from *Graham vs. John Deere Co.*, 383 U.S. 1, 6, 15 L.Ed.2d 545, 550:

> ". . . Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must 'promote the Progress of . . . useful Arts.' This is the *standard* expressed in the Constitution and it may not be ignored."

That novelty is required is further set out in the *Graham case*, p. 12, where it is said:

> "An analysis of these three sections indicates that patentability is dependent upon three explicit conditions: *Novelty* (emphasis added) and utility as articulated and defined in § 101 and § 102, and nonobviousness, the new statutory formulation, as set out in § 103."

That the subject matter of the patent must be something which is new or novel, must add to the sum of human knowledge, and be such as to advance science is well established in the law. That the idea and use of water flush systems to clean dairy barn floors is not new or novel is clear. In the light of this fact, it must be said that the Gribble patent adds nothing to the sum of human knowledge, nor does it in any way advance science. It must follow that the claim of the Gribble patent is not patentable, and that the patent is not valid.

The Obvious-Nonobvious Test

In 1952 Congress enacted § 103 of Title 35 U.S.C. into law. It reads:

> "A patent may not be obtained though the invention is not identically disclosed or described as set forth in § 102 of this Title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Pat-

> entability shall not be negatived by the manner in which the invention was made."

This section is specific in stating an invention is not patentable if the differences between the subject matter sought to be patented and the prior art are such that the *subject matter as a whole* would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.

Section 103 was closely examined and applied in *Graham vs. John Deere Co.*, 383 U.S. 1, 15 L.Ed.2d 545 (1966), when the question of the validity of a patent on a "clamp for vibrating shank plows" was determined. In 1955, the Fifth Circuit had held this same patent valid under its rule that when a combination produces an "old result in a cheaper and otherwise more advantageous way," it is patentable. On certiorari to the Eighth Circuit, this Court held that that patent was invalidated and the Fifth Circuit's rationale was erroneous. In the Opinion in the *Graham case*, reference was made to the constitutional provision which authorizes the Congress "To promote the progress of . . . useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries", and stated this clause is both a grant of power and a limitation. It further said with respect to the exercise of the patent power by Congress:

> "Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. More-

over, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must 'promote the Progress of . . . useful Arts.' This is the *standard* expressed in the Constitution and it may not be ignored. And it is in this light that patent validity 'requires reference to a standard written into the Constitution.' "

The Opinion thereafter refers to Sections 101, 102 and 103 and states that an analysis of the structure of these three sections indicates that patentability is dependent upon three explicit conditions: Novelty and utility as articulated and defined in Section 101 and Section 102, and nonobviousness, the new statutory formulation, as set out in Section 103. The Opinion further states:

> "Section 103, for the first time in our statute, provides a condition which exists in the law and has existed for more than 100 years, but only by reason of decisions of the courts. An invention which has been made, and which is new in the sense that the same thing has not been made before, may still not be patentable if the difference between the new thing and what was known before is not considered sufficiently great to warrant a patent. That has been ex-

> pressed in a large variety of ways in decisions of the courts and in writings. Section 103 states this requirement in the title. It refers to the difference between the subject matter sought to be patented and the prior art, meaning what was known before as described in Section 102. If this difference is such that the subject matter as a whole would have been obvious at the time to a person skilled in the art, then the subject matter cannot be patented."

The Court also stated that the Reviser's Note to this section, with apparent reference to Hotchkiss, recognizes that judicial requirements as to "lack of patentable novelty (have) been followed since at least as early as 1850," and noted that the reports of both Houses of Congress showed the section is added to the statute for uniformity and definiteness. Following this the Opinion states:

> "We conclude that the section was intended merely as a codification of judicial precedents embracing the Hotchkiss condition, with congressional directions that inquiries into the obviousness of the subject matter sought to be patented are a prerequisite to patentability."

The Opinion then points out that under Section 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved; and that against this background, the obviousness or nonobviousness of the subject matter is determined. The

Court specifically refused to find in Section 103 a relaxed standard in determining patentability, stating the standard has remained invariable with this Court, but also noting that technology has advanced with remarkable rapidity in the last fifty years, and that the ambit of applicable art in given fields of science has widened by disciplines unheard of a century ago. The Opinion then states,

> "It is but an evenhanded application to require that those persons granted the benefit of a patent monopoly be charged with an awareness of these changed conditions. The same is true of the less technical, but still useful arts. He who seeks to build a better mousetrap today has a long path to tread before reaching the Patent Office."

The question of nonobviousness is also discussed and applied in *Anderson's-Black Rock, Inc. vs. Pavement Salvage Co., Inc.*, 396 U.S. 57, 24 L.Ed.2d 258. This case involved a combination patent on a piece of paving equipment wherein the patentee placed a radiant heat burner on the side of a standard paving machine, and the question was one of nonobviousness. The Opinion refers to Section 103 and quotes from the *Graham case*, and then held the combination was reasonably obvious to one with ordinary skill in the art. The concluding statement of the Opinion is:

> "We conclude that while the combination of old elements performed a useful function, it added nothing to the nature and quality of the radiant-heat burner already patented. We conclude further that to those skilled in the art the use of the old elements in combination was not an invention by the obvious-nonobvious standard. Use of the radiant-heat burner in this important field marked a successful venture. But as noted, more than that is needed for invention."

"Dairy Establishment" does not meet the test of nonobviousness. Claim 1 includes a list of component parts of dairy barns the way large numbers of them have long been built. Respondent admits there is nothing new in the claim of its patent in this respect (A. 75). Claim 1 and 3 also include as a component part the recitals of a floor washing means located over a region of the floor which is uphill from the drain, constructed to collect water as a pool above the floor and operable after such collection of water as a pool to disperse the water as a sheet of water over the floor; and further the floor washing means comprising a dam for damming and collecting water as a pool directly on the floor, and such dam abruptly openable to send such water as a sheet over the floor towards said drain means (A. 32-3). All that these claims describe is a *means*, not specified, of collecting a pool of water either above the floor or on the floor at the upper end of the dairy behind a dam which is abruptly openable to send a sheet of water over the floor for cleaning purposes. In other words, it merely recites that a pool of water is to be collected where it can be released quickly, and flow by gravity down the slope of the dairy barn floor, cleaning it. This is not invention. Because of gravity, and not invention, water will always run downhill. Furthermore, because of the general propensity of water, and not invention, water tends to loosen and carry with it matter that is deposited in its

path as it runs downhill. Generally, the cleaning action of water is directly related to the slope or grade of the floor and the volume of water that is released. This does not meet the test of nonobviousness.

Under 35 U.S.C. § 103, the scope and content of each element of the prior art are clearly set forth in the record, and the "means" to accomplish the flush in each case is water, although the volume that is released on any given occasion will vary. As a matter of law, it is reasonably obvious to one skilled in the art of dairy construction to increase the quantity of water to improve the quality of a "flush system." As a matter of law, it is a mere matter of "convenience" or "design" to have the water released from a storage tank located at the upper end of a dairy barn floor, as opposed to diverting a stream, or storing the water in an irrigation ditch or canal adjacent to the upper side of a dairy barn floor. Common sense would dictate that the stored water, however it is to be released, would not be located at the *lowest level* of a sloped floor. *Common sense also* dictates that the barn floor should be grated or sloped downhill in order to assist in the removal of the water. The damming or the storing of water is an admittedly old idea, and whether the water is stored in a tank, or in a ditch or canal adjacent to a barn, is not a "new or different function." The adoption of a dump tank to store the water directly on the floor of a basic plan for a modern dairy barn does not create a different use or function for either the water, or for the floor plan, nor by being joined together in a "combination" of admittedly old elements, does either element act differently in the combination than they would act separately and apart. *Lincoln Engineering, Anderson's-Black Rock*, and *Graham, supra*. Certainly the application of gravity to allow water to create its natural surging action as it flows downhill is not an idea spawned of invention, but rather is an application of a natural law of physics. *Concrete Appliances Co. vs. Gomery*, 269 U.S. 177, 70 L.Ed. 222 (1925).

The facts of this case can hardly be mentioned to anyone without getting an immediate response of "what about Hercules cleaning the Augean stables?" Which only goes to show that the concept of cleaning stables or barns by releasing a quantity of "flush water" onto the barn floor, to flow downhill, goes back to ancient times. The use of weirs or gates in streams, canals or flumes is likewise an ancient device for accumulating water in a pond, tank or ditch, and for releasing it onto a particular area for a specific purpose, as running a millwheel, irrigation, or cleaning a barn floor. The record in this case specifically shows that the weir system was used in dairies at Weed, Lodi and Bishop, California long prior to 1963 (A. 160-2). The modus operandi was to collect water from mountain streams in a ditch alongside the dairy barn, by using a weir or gate at the lower end of the ditch, which dammed it, and then, by use of a weir in the ditch at the upper end of the barn to release the water into the barn at its upper end. The water flowed across the end of the barn, and then, by gravity, down the slope of the barn floor, cleaning it (A. 204-8). Such a system is essentially the same as described in the Gribble patent. The weir system collects a pool of water adjacent to the dairy barn, and by use of a weir adjacent to the upper end of the dairy barn floor, releases the water onto the barn floor, where it flows down the grade of the floor, cleaning the floor as it goes.

With the language of the patent examiner as well as the patents themselves of record, the question of whether or not the prior art completely anticipates the patent in question can be determined as a matter of law. *Hughes Tool Co., supra*. The presumption of validity which attaches to an issued patent is not conclusive and can be rebutted even where the references relied upon were thoroughly considered by the Patent Office. *Zero Manufacturing Co. vs. Mississippi Milk Producers Association*, 358 F.2d 853 (5th Cir. 1966). See also *Butex Gas vs. Southern Steel Co.*, 123 F.2d 954 (5th Cir. 1941).

Mr. W. C. Fairbanks had a negative opinion as to the validity of the patent in question in view of the articles published in *Hoarde's Dairyman* (about Chester Whitmore's dairy), the *California Dairyman*, and *Western Dairyman* which were not brought to the attention of the Patent Office (A. 159-62, 171). There is certainly in the record nothing to indicate that the Patent Office had before it the first-hand knowledge of "flush systems" possessed by Mr. Robert Price, Mr. W. C. Fairbank, Mr. Emil Rovey, Mr. Frank Souza, Mr. Chester Whitmore, or Herbert Meyer prior to the time the patent in question was issued. Furthermore, the Hal Higgins' collection of "water flush systems" on file at the Davis Library was also not considered. When it is demonstrated, as in the instant case, that the Patent Office was not shown or did not consider pertinent prior art, any presumption that might otherwise attach to the validity of a patent is overcome. *B. F. Goodrich Co. vs. Rubber Latex Products, Inc.*, 400 F.2d 401 (1968); *Stamicarbon, N. V. vs. Escambia Chemical Corp.*, 430 F.2d 920 (5th Cir. 1970).

As this Court noted in *Graham, supra*, to-wit:

> "It is, of course, well settled that an invention is construed not only in the light of the claims, but also with reference to the file wrapper or prosecution history in the Patent Office . . . Claims as allowed must be read and interpreted with reference to rejected ones and to the state of the prior art; and claims that have been narrowed in order to obtain the issuance of a patent by distinguishing the prior art cannot be sustained to cover that which was previously by limitation eliminated from the patent."

As a matter of law, Claims 1 and 3 of the patent in question do not meet the test of Section 103 since the differences between them and the pertinent prior art would have been obvious to a person reasonably skilled in that art.

Overclaiming Causes Invalidity

Even assuming Respondent is correct in contending that the means claimed to collect water as a dam that can be suddenly released to allow the water to escape as a large volume to flow as a sheet over the floor of a dairy barn is a new or novel idea, Claim 1 and Claim 3 are still invalid because Respondent has overclaimed his invention by including within the "combination" all of the old elements of a standard dairy barn which are not patentable as being dependent and integral parts of the claim in question. Mr. Gribble testified that it was necessary to make Claim 3

dependent upon Claim 1 in order to properly frame the "flush system" (A. 22, 24-5, 75, 78). Mr. Fairbank was of the opinion that except for the single feature of a tank used to store water, the patent was much too broad (A. 170).

In *A & P Tea Co., supra*, this Court announced a basic proposition of patent law that an improvement, although maybe patentable in and of itself, can cause a patent to nevertheless be invalid for overclaiming the invention, by including old elements within the improvement, unless, together with its other old elements, the improvement made up a new combination patentable as such. See also *Stewart-Warner Corp., supra*. The individual elements, in the "combination" in which they are claimed as an invention, must satisfy the test of novelty and nonobviousness set forth above. A "claim" must adequately and specifically describe the patentable invention, because it is the "claim" of the patent, and not any particular device manufactured by the patentee to which the Court must look to to determine validity. *A & P Tea Co., supra*. As a practical matter, patents claiming narrow, specific inventions are much more likely to withstand the attack on anticipation or obviousness, than patents that make broad, general claims. *Sterner Lighting, Inc. vs. Allied Electrical Supply, Inc.*, 431 F.2d 539 (5th Cir. 1970).

Newly Discovered Evidence

Pursuant to the directive of the Court of Appeals, Fifth Circuit on June 25, 1973 (Appendix B, p. 6a-9a) Petitioner filed in the District Court an instrument entitled "Defendant's Motion For A New Trial" (A. 120-

30) which specifically raised the question of the newly discovered evidence Petitioner had uncovered since the date of trial on September 13, 1971, and *prior* to the date the Court of Appeals entered its decision of February 5, 1973 (Appendix C, p. 9a-22a) reversing the Trial Court Judgment in favor of Petitioner (A. 44-5).

In Paragraph 7 of "Defendant's Motion For New Trial", Petitioner *specifically identified* Mr. Herbert G. Meyer, Mr. Frank S. Souza, Mr. Emil Rovey, Mr. Chester Whitmore, and Mr. Dick Ripley as being the individuals whom Petitioner intended to call in support of his Motion For Newly Discovered Evidence of prior art of water flush systems that antedated Respondent's patent (A. 123).[9]

On February 6 and 7, 1974, a hearing on said Motion was held in El Paso, Texas before the Honorable John Wood, wherein Bernard A. Sakraida, Aubrey Wisdom, Emil Rovey, Frank Souza, Chester Whitmore, and Herbert G. Meyer all testified in support of Petitioner's contention of newly discovered evidence, and their testimony showed that as a matter of law Respondent's patent should be held invalid in that it was not new nor novel, and did not meet the test of being nonobvious. Additionally, the complete oral deposition of Mr. W. C. Fairbank, which had been taken at the request of Respondent on August 16, 1973, was also introduced into evidence before Judge Wood (A. 131).

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9 Respondent chose not to use the Federal Rules of Discovery to uncover the knowledge of prior art known by Mr. Rovey, Souza, Whitmore, and Meyer.

At the conclusion of the hearing, Judge Wood made the following pronouncement, to-wit:

> "All right. I find that the evidence adduced under the Motion For New Trial based on newly discovered evidence would, standing alone, and unchallenged and uncontroverted by opposing evidence, would overcome the judgment, since the evidence clearly shows that this flushing system was not new, not novel and did not meet the test of nonobviousness, and the prior use of the flushing systems was thus in anticipation of this patent. I will enter an order this date to this effect. That's all, you are excused" (A. 268).

Later that same day, Judge Wood entered his written Opinion of February 7, 1974 (A. 174-5), encompassing the quoted language above. In his Order of February 7, 1974, Judge Wood found that Petitioner exercised due diligence as required under Rule 60(b)(2) F.R.C.P., and that the evidence presented to the Court could not have been discovered in time to move for a new trial under Rule 59(b) F.R.C.P. The newly discovered evidence was found by the Court to be discovered "purely by chance" at a meeting in January of 1973 between Mr. Herbert G. Meyer and Bernard Sakraida.

The evidence of the "by chance" meeting in Florida in January of 1973, between Mr. Sakraida and Mr. Meyer is set forth in detail in the statement above (A. 177-80, 190-3, 255-7, 261, 263). The efforts of Mr. A. M. Wisdom to obtain information at the request of Mr. Sakraida about the Mission Dairy are of record (A. 195-7).

The evidence clearly supports the Trial Court finding that Petitioner was entitled to a new trial under the provisions of Rule 60(b)(2) F.R.C.P. because of newly discovered evidence, under the provisions of Rule 52 F.R.C.P. The evidence of record clearly supports the fact that Petitioner was never knowledgeably informed of facts surrounding the existence of the type of water flush system being used at the Mission Dairy by Mr. W. C. Fairbank in 1969, because the latter's letter of October 8, 1969 (A. 173), and his subsequent Affidavit of October 13, 1969 (A. 34-6) wholly failed to "cite" this location or Herb Meyer as an individual known to Mr. Fairbank as a possible source of prior art. Until such time as Petitioner had his "by chance" meeting with Mr. Meyer in Florida in Januaryof 1973, he was acting simply on hearsay statements, hardly better than rumor, which from a practical standpoint of Petitioner living in Florida, the suit pending in El Paso, and the Mission Dairy being located in California, didn't justify further expenditures in trying to check out. Located within the State of California were many dairies (A. 232, 244), and trying to pin down facts with respect to them while living in Florida was a difficult task, and frontsight, as distinguished from hindsight, showed Petitioner used due diligence, as the Trial Court so found. After personally visiting with Mr. Herbert Meyer in Florida in January of 1973, Petitioner took prompt and reasonable steps and showed diligence in bringing the new evidence of prior art to the attention of the Court in El Paso. The Trial Court properly exercised its discretion at the hearing in February of 1974, received the evidence, reviewed the standard of diligence required under Rule 60(b) F.R.C.P., and entered an appropriate Order

which is entitled to be upheld because not clearly erroneous. Rule 52 F.R.C.P. *Traylor vs. Pickering*, 324 F.2d 655 (5th Cir. 1963); *English vs. Mattson*, 214 F.2d 406 (5th Cir. 1954); *Bros., Inc. vs. Grace Manufacturing Co.*, 320 F.2d 594 (5th Cir. 1963).

The new evidence brought to the attention of Judge John Wood in February, 1974, was discovered solely by chance. Petitioner was not lacking in due diligence discovering said evidence, the evidence was material and of a nature that it would probably change any doubt as to the validity of Respondent's patent, and said evidence was not merely cumulative or impeaching. For the foregoing reason, Petitioner respectfully prays that the Trial Court finding that awarded him a new trial based upon new evidence, be affirmed, because the evidence clearly supports the conclusion that Respondent's patent was not new nor novel, and did not meet the test of being nonobvious under 35 U.S.C. § 103.

CONCLUSIONS

Respondent's combination patent entitled "Dairy Establishment" is not novel, and does not meet the test of being nonobvious under 35 U.S.C. § 103 to a person having ordinary skill in the art to which the subject matter of the patent pertains. Because "Dairy Establishment" does not satisfy the statutory test of patentability set forth within 35 U.S.C. § 101, 102 and 103, any other descriptive terminology that may be used to describe the effect or quality of the patent, such

as "synergistic effect" is legally immaterial upon which to base patent validity. The Opinion of the Court of Appeals for the Fifth Circuit which predicated patent validity did so on a basis that was not limited by the statutory language set forth in 35 U.S.C. § 101, 102 and 103. Because the correct standard for determining patent validity was not followed, the Fifth Circuit Judgment upholding validity must be reversed. This Honorable Court can review the question of validity as a question of law, and render Judgment in favor of Petitioner.

The Trial Court finding to the effect that this combination did not show invention, did not meet the test of nonobviousness when viewed by the standard prescribed by 35 U.S.C. § 103, and the further finding that Petitioner was entitled to a new trial because of newly discovered evidence, the evidence introduced being sufficient to rebut any presumption of validity of the patent, when viewed against the standard prescribed by Rule 52 F.R.C.P., are entitled to be affirmed and upheld because they are supported by credible evidence of record and are not clearly erroneous.

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that this Honorable Court answer each of the questions submitted in the affirmative, that the Court invalidate the combination patent entitled "Dairy Establishment", that the complained of Judgments from the Court of Appeals, Fifth Circuit, be in all things reversed and rendered in favor of Petitioner, that Petitioner recover all of his cost and expenses incurred by said appeals, and that he have

such other and further relief to which under the law he is justly entitled.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the above and foregoing Brief has this day been served upon opposing counsel of record by placing same in the United States Mail, postage prepaid and properly addressed on this the ___ day of December, 1975.

APPENDIX F

Art 1 § 8, cl. 8, United States Constitution

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

35 U.S.C. § 101 — Inventions patentable

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title. July 19, 1952, c. 950, §§ 1, 66 Stat. 797.

35 U.S.C. § 102 — Conditions for patentability; novelty and loss of right to patent

A person shall be entitled to a patent unless —
(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or
(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or
(c) he has abandoned the invention, or
(d) the invention was first patented or caused to be patented by the applicant or his legal representatives or assigns in a foreign country prior to the

date of the application for patent in this country on an application filed more than twelve months before the filing of the application in the United States, or

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or

(f) he did not himself invent the subject matter sought to be patented, or

(g) before the applicant's invention thereof the invention was made in this country by another who had not abandoned, suppressed, or concealed it. In determining priority of invention there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other. July 19, 1952, c. 950, §§ 1, 66 Stat. 797.

35 U.S.C. § 103 — Conditions for patentability; nonobvious subject matter

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made. July 19, 1952, c. 950, §§ 1, 66 Stat. 798.

APPENDIX G

The remarks have been carefully considered, however, they are not convincing. The method claims appear to include nothing more than conventional and necessary steps in the milking of cows in confined areas and cold climates. The apparatus claims fail to present new and novel limitations other than that shown in the applied references.

A claim such as 19 may be amended to avoid the art by including the dump tanks and dam positively and their respective location with the different areas and their co-operation so as to clean the different areas with the wash water and waste being collected in one tank for a desired purpose. Desired dependent claims may be added to depend from amended claim 19.

In view of the procedures set forth in 803 O. G. 893 this rejection is made *FINAL*.

The newly applied references are held to be necessitated by newly presented claims and amendments to the original claims. (R. 155).